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No. 84-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,
Respondents,

and

CITICORP (USA), INC.,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 24, 1985

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QUESTION PRESENTED

The issue presented on which lower federal courts are divided is whether a state agency, simply by reason of its status as such, is exempt from the federal antitrust laws where its action is neither required nor specifically authorized by the State Legislature.

PARTIES TO THE PROCEEDING

Deak-Perera Hawaii, Inc. (Plaintiff)*

Department of Transportation, State of Hawaii (Defendant)

Ryokichi Higashionna, in his official capacity as the Director of the Department of Transportation for the State of Hawaii (Defendant)

Owen Miyamoto, in his official capacity as Chief of the Airport Division of the Department of Transportation of the State of Hawaii (Defendant)

Citicorp (USA), Inc. (Intervenor on behalf of the Defendants)

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* A list of all parent companies, subsidiaries, and affiliates of Deak-Perera Hawaii, Inc. is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 745 F.2d 1281 (9th Cir. 1984) and appears in the Appendix hereto (hereinafter referred to as "App. ——") at 1a-5a. The opinion of the United States District Court for the District of Hawaii is reported in 553 F.Supp. 976 (D. Haw. 1983), and appears in the Appendix hereto at 6a-32a.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 26, 1984. No requests for rehearing were filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth in the Appendix at 33a-56a. They are as follows:

Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1982)

Haw. Const. Art. V, §§ 5, 6

HAWAII REV. STAT. §§ 261-4, 261-5, 261-7, 261-9, 261-12, 480-12

Act 243, 1981 Hawaii Sess. Laws

Act 90, 1982 Hawaii Sess. Laws

STATEMENT OF THE CASE

Factual Background

In May of 1982, the director of the Department of Transportation of the State of Hawaii (hereinafter "DOT") decided to solicit bids from foreign currency exchange companies for an exclusive five-year lease of all five retail foreign currency exchange concessions at the State-operated Honolulu International Airport, commencing July 1, 1982.

Until the 1982 concession bid, Deak-Perera Hawaii, Inc. had been the only bidder for the retail foreign currency exchange concessions at the airport, and had operated there since 1972. Deak-Perera bid for the new lease, but was out-bid by Citicorp-USA (Intervenor below).

By virtue of the exclusivity of the Citicorp-USA lease, Deak-Perera was thereafter denied the right to operate any business at the airport for the next five years.

The grant of these exclusive foreign currency exchange concessions has never been specifically authorized by the State Legislature.[1] The authority of the director of the DOT to grant such exclusive concessions was based on his general powers as the agency's chief executive officer. The DOT is an administrative agency created under Article V, Section 6 of the Hawaii State Constitution. App. 54a-56a.

Proceedings Below

After losing the bid, but before the new lease was to take effect, Deak-Perera filed the instant action in the District Court of Hawaii, alleging, *inter alia*, that the grant of the exclusive lease by the DOT violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), App. 33a.[2]

Plaintiff Deak-Perera moved for partial summary judgment on the single issue of law of whether the State Defendants and Intervenor Citicorp-USA were shielded from federal antitrust liability by the state action immunity doctrine. The Defendants filed a cross-motion for summary judgment on the same issue. The district court

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[1] The State Legislature has chosen to act only with respect to one of the other airport concessions, which is engaged in the sale of duty-free goods. *See* Acts 243 (1981 Hawaii Sess. Laws) and 90 (1982 Hawaii Sess. Laws) at App. 44a, 48a. The Hawaii Legislature chose to specifically displace competition in this narrow line of commerce and actively supervise the "monopolist". The Hawaii Legislature has not specifically authorized the displacement of competition for any other line of commerce at the airport.

[2] Jurisdiction in the district court was based on the existence of substantial federal questions and pendent state claims. 28 U.S.C. § 1331 (1982).

ruled for the Defendants on both motions. In doing so, the court noted that there was no genuine issue of material fact and that the facts were as stated by Deak-Perera in its memorandum in support of motion for partial summary judgment. (*See* Statement of Facts excerpted from the memorandum, CR 51, App. 57a-60a.)

The district court relied on no affirmative expression of legislative policy requiring the DOT to displace competition at the airport. Instead, it implied sovereignty to the DOT from general enabling statutes.

> The DOT, as an instrumentality of the state, has full power to enter into contracts for concessions at H.A, even though monopolistic in nature, to fulfill its mandate to generate sufficient funds to support the statewide airport system. In all of this, the DOT is authorized and required to act and to act in the name of the State of Hawaii. This court can only conclude, therefore, that when the DOT acts, it is the same, in full part and parcel, as if the State of Hawaii were acting. Therefore, the actions of the DOT, whether they concern contracts or management of Hawaii's airport system, are entitled to state-action immunity as the acts of the State of Hawaii as sovereign.
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> 553 F.Supp. 976, 985 (D. Haw. 1983), App. 24a.

On appeal, the Ninth Circuit affirmed, likewise holding that the general authority granted to the DOT pursuant to the Hawaii Constitution and statutes was tantamount to a conferral of legislative capacity.

REASONS FOR GRANTING THE WRIT

This case presents the next logical development in the unfolding of the *Parker*[3]-*Midcal*[4]-*Hoover*[5] line of state

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[3] Parker v. Brown, 317 U.S. 341 (1943).

[4] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980).

[5] Hoover v. Ronwin, 104 S.Ct. 1989 (1984).

action immunity cases. It raises a substantial and important question of law not explicitly resolved in any prior decision of this Court, a question on which the lower courts are in disarray: Whether a state agency and its officials are entitled to federal antitrust immunity merely by virtue of their status, where their challenged actions were neither required nor specifically authorized by the State Legislature.

I. THE DECISION BELOW IS ERRONEOUS.

Does the grant of general operating authority to a state administrative agency, without more, entitle it to sovereign antitrust immunity? The Ninth Circuit says yes. In so holding, however, the Ninth Circuit has disregarded the rationale of the governing *Parker-Midcal-Hoover* line of cases.

One thread clearly runs through all this Court's recent "state action" decisions: Legislative direction or specific authorization of the challenged restraint must be shown before sovereign "state action" can be found. The Ninth Circuit has found "state action" in the absence of either factor. Review by this Court is clearly appropriate in these circumstances.

A. The Ninth Circuit's decision plainly misinterprets the State action immunity doctrine in a fundamental respect.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that a state agricultural marketing program was exempt from challenge under the Sherman Act because the program "derived its authority . . . from the legislative command of the state. . . ." 317 U.S. at 350. The principle announced in *Parker* was clear and simple: conduct undertaken by state officials at the direction of the legislature could not constitute a violation of the antitrust laws.

Since *Parker*, the Court has elaborated further on standards for finding "state action". Thus, when a State acts through its legislature (*Parker*) or through its Supreme Court acting in a legislative capacity (*Hoover*), the State is acting as a sovereign; and therefore, without more, such action is immune from Federal antitrust liability.

When a claimed exemption from Federal antitrust liability is based on the action of a subdivision or agency of the State, however, this Court unequivocally and repeatedly has required that two additional showings be made: (1) that the action is pursuant to a "clearly articulated and affirmatively expressed state policy" requiring the challenged restraint; and (2) that the action is "actively supervised" by the State. *Midcal*, 445 U.S. at 105; *Hoover*, 104 S.Ct. at 1995. This Court has insisted on these two additional requirements being met without regard to whether private parties are involved.[6]

The Court's most recent statement of the doctrine is *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). The Court in *Hoover* found that the conduct at issue (alleged restraints in State bar admission requirements and procedures) was in fact that of the State Supreme Court acting in its legislative capacity. It therefore never reached the issues of state policy and adequate supervision because it found that such conduct was sovereign in nature and therefore exempt from antitrust scrutiny.

In the instant case, the Ninth Circuit has misapplied *Hoover* to mean that a state administrative agency, by reason of its grant of general operating authority from

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[6] The Ninth Circuit apparently regards the two-prong *Midcal* test to be appropriate only when private parties are involved. *See* 745 F.2d at 1283, App. 4a. It is in error, however, in assuming that there is no such involvement in the case at bar. The challenged restraint is a private monopoly of the foreign exchange concessions at the Honolulu International Airport. That monopolist is Citicorp-USA.

the State Legislature, is tantamount to the Legislature or to the State Supreme Court acting in a legislative capacity.

The Hawaii State Legislature has never authorized the DOT to replace entirely free competition with exclusive foreign currency exchange concessions at the Honolulu International Airport. And it is the Legislature, not the DOT, that wields the ultimate decision-making authority for the state in this area. That is evident from the subsequent enactment by the Legislature of an act which authorized an exclusive duty-free concession at the airport. *See* Act 90, 1982 Hawaii Sess. Laws, App. 48a-53a.

The court below plainly ignored the analysis set out in *Hoover*:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization. * * * * In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State. * * * * If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite.
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> 104 S.Ct. at 1995 (citations omitted)

B. The Ninth Circuit has created confusion and uncertainty in the enforcement of the antitrust laws by misapplying the State action immunity tests established by this Court.

The Ninth Circuit reasoned that general enabling statutes conferred sovereign capacity upon the DOT by implication. The test imposed by this Court, however, requires lower courts to discern at the very least an explicit "legislative command of the state". *Parker*, 317 U.S. at 350.

The only Hawaii statutes which may bear any relation to the DOT's authority to control competition among con-

cessionaires at the airport are (a) enabling statutes which generally authorize the department to operate the airport;[7] (b) statutes providing that its acts be in conformance with state and federal laws;[8] and (c) a statute prohibiting the grant of exclusive rights.[9]

The plain language of the Hawaii statutes demonstrates no reference to the restraint challenged by Deak-Perera, *i.e.*, displacement of competition in the retail foreign currency exchange business at the airport. Thus, it is not possible to find that these statutes constitute the "legislative command of the state".

In *Hoover*, the Court underscored the requirement that the activity which may be deemed sovereign be "directly that of the legislature or supreme court". 104 S.Ct. at 1995. When a program "is carried out by others pursuant to state authorization . . . it becomes important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State". *Id.*

The Court thus has made it very clear that a state agency and its officials are not automatically immune, nor have they ever been so categorized. This Court has never granted blanket immunity to any governmental agency merely because of its status. The Ninth Circuit nevertheless held that the DOT was entitled to blanket immunity because of its status as a state agency.

II. THE NINTH CIRCUIT PRESENTS THIS COURT WITH A QUESTION OF SUBSTANTIAL AND RECURRING IMPORTANCE IN THE ADMINISTRATION OF THE FEDERAL ANTITRUST LAWS.

The underlying purpose of federal antitrust laws is to allow competition in the marketplace and protect the consuming public. This policy is so strong that a blanket immunity ought not to be given to a state agency merely

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[7] *See* HAWAII REV. STAT. §§ 261-4, 261-5, 261-7, App. 34a-41a.

[8] *See* HAWAII REV. STAT. §§ 261-9, 261-12, 480-12, App. 41a-43a.

[9] *See* HAWAII REV. STAT. § 261-9, App. 41a.

because of its status. State officials should not be exempt from federal antitrust liability where the state has given no express authority for them to displace basic federal economic policy, and where they fail to actively supervise the specific activity or line of commerce in which competition has been restrained.

Although the instant case involves statutes applicable by their terms only to Hawaii, and to the particular subject of exclusive concessions at airports, the impact of the Ninth Circuit's decision is not so limited. The opinion purports to immunize all members and agencies of the Executive Branch of any state whenever they act in any of the areas where they have statutory powers, at least as long as such powers can be characterized as "public, governmental functions." The lower courts here have ruled, in effect, that subordinate governmental units have automatic and blanket antitrust immunity whenever they engage in any anticompetitive activity in an area where they have statutory powers to act, at least if those powers can be deemed to be "public and governmental" in nature.

State agencies, departments, commissions, boards, and offices are myriad in number and in areas of activity. One may analogize them to the municipalities that have come under this Court's scrutiny in the past. As noted in *City of Lafayette v. Louisiana Power & Light Co.*, the activities of such subordinate governmental units impact on the national economic system in a wide variety of ways. 435 U.S. 389, 407-08 (1978). The economic choices made by such entities, however, are not necessarily likely to comport with the broader economic policies of the antitrust laws. *Id.* at 403. Thus, as stressed in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982), if those units are left free to make such choices based only on their own parochial self interests and without regard for the nation's economic goals embodied in the antitrust laws, serious economic dislocation could result.

The Ninth Circuit's decision here will indeed enable all state agencies and officials in the nation to place their own economic self-interest ahead of the regime of competition which is the fundamental principle governing commerce in this country. *See City of Lafayette*, 435 U.S. at 398. Such a result is directly contrary both to the teachings of the *Parker-Midcal-Hoover* line of cases and to the pro-competitive principles on which those decisions are founded. It is decidedly more far-reaching than that which this Court sought to avoid with its ruling in any of the cases above.

If the decision below is allowed to stand, state agencies and officials will be immune from federal antitrust liability on the fallacious theory that legislative "contemplation" of their anticompetitive activities suffices for state action immunity and can be implied merely from a general statutory scheme.

The issue of agency immunity, therefore, is of substantial importance to the administration of the antitrust laws. It is also of recurring importance. This Court has only to look at the "state action" cases it has decided in the last ten years to discern what the effect of the decision below will be. Most of those cases presented this Court with a fact situation not unlike the case at bar, where the acts at issue were of commissions, boards, and political subdivisions of a state which were *fully empowered* by the state generally to engage in those acts. Under the rationale advanced by the Ninth Circuit in the instant case, the results in those cases would be quite different today. The acts in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) *overruled, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Lafayette*, to name a few, would be exempt in that they proceeded from a general grant of power from the state, but not from a specific authorization to engage in the challenged restraint.

III. THE LOWER FEDERAL COURTS ARE SPLIT ON THE APPLICABILITY OF STATE ACTION IMMUNITY TESTS.

However complete the articulation of the Court's standards for discerning state action may be, the precise question of their application to state administrative agencies and officials has split the lower federal courts.

Courts have diverged onto several streams in this area. There is a line of cases which holds that state agencies and instrumentalities are exempt when the challenged restraint has been contemplated by the state legislature, although the definition of "contemplation" has been in no way precise.[10] There is also a line of cases that provides for exemption when the agency is providing public health and safety functions (as in an ambulance service) or governmental functions (as in a public monopoly).[11] By far the longest line of cases (which in many instances issue from the same courts which issued cases in the lines above) consists of those which have applied the *Midcal* analysis.[12] And then there is the case at bar.

The Ninth Circuit is the first Circuit Court known to Petitioner to apply *Hoover* in exempting a state administrative agency as a sovereign without reaching a *Midcal* analysis. Yet the area of commerce in the case at bar is not a traditional government function dealing with public health and safety. Retail foreign currency exchange is a purely commercial activity which poses no

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[10] *See, e.g.*, Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

[12] *See, e.g.*, Corey v. Look, 641 F.2d 32 (1st Cir. 1981); City of Kirkwood v. Union Electric Company, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982).

[11] *See, e.g.*, Gold Cross Ambulance v. City of Kansas, 705 F.2d 1005 (8th Cir. 1983); E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

threat to the safe operation of the airport. As a practical matter, it has no impact on the health and safety of the public. And the activity here is being conducted as a monopoly by a private party, not the state.

Even if the holding of *Hoover* can be extended to exempt state administrative agencies in certain instances in accord with the several lines of cases above (for example, in cases where the state is operating a monopoly or where public health and safety are involved), it cannot lead to an exemption of the DOT in this instance. Where there is no clear legislative mandate and no state supervision of the challenged restraint, and particularly where private parties are involved, such a policy would have deleterious impact on the enforcement of the nation's antitrust laws.

CONCLUSION

The question of law presented is substantial, important and recurring. The lower court decisions in this area of general antitrust enforcement present a confusing picture. A definitive ruling by this Court would therefore serve the public interest.

The petition for certiorari should be granted. Moreover, since the error of the Court of Appeals of the Ninth Circuit in misapplying the state action exemption is so patent, the Court may wish to consider the appropriateness of summary reversal.

Respectfully submitted,

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January 24, 1985

SUPPLEMENTAL APPENDIX

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DEAK-PERERA HAWAII, INC.

Parent Companies

1. Deak & Co., Inc.
2. Foreign Commerce Bank
3. Deak-Perera U.S., Inc.
4. Deak-Perera Delaware, Inc.

Affiliates

1. International Insurance Specialists, S.A.
2. Deak-Perera International Banking Corporation
3. Deak-Perera, Inc.
4. Deak-Perera Finance, Ltd.
5. Tourex Company of America, Inc.
6. Deak-Perera Wall Street, Inc.
7. Eden Flowers, Ltd.
8. Deak-Perera Guam, Inc.
9. Hawaii Mountain View Development Corp.
10. Deak-Pererea Saipan, Inc.
11. Bankhaus Deak & Co., Ltd.
12. Eurotrade Bank & Trust
13. Deak-Perera Trading, Inc.
14. Deak-Perera Far East, Ltd.
15. Deak-Perera Commodities, Ltd.
16. Deak-Perera Bullion, Ltd.
17. Compass Travel, Ltd.
18. Deak & Co. of Macao, Ltd.
19. Compass Commercial Co., Ltd.
20. Deak-Perera Finance Group, Inc.
21. Deak-Perera Futures, Inc.
22. Deak-Perera Securities, Inc.
23. D-P Promotions
24. Deak-Perera Alaska, Inc.
25. Deak-Perera Canada, Inc.
26. Deak-Perera Colorado, Inc.

27. Deak-Perera Boston, Inc.
28. Deak-Perera California, Inc.
29. Deak-Perera Chicago, Inc.
30. Deak-Perera Georgia, Inc.
31. Deak-Perera Connecticut, Inc.
32. Deak-Perera Florida, Inc.
33. Deak-Perera International, Inc.
34. Deak-Perera New Jersey, Inc.
35. Deak-Perera Nevada, Inc.
36. Deak-Perera Puerto Rico, Inc.
37. Deak-Perera Southeast, Inc.
38. Deak-Perera Seattle, Inc.
39. Deak-Perera Texas, Inc.
40. Deak-Perera Washington, Inc.
41. Deak, A.G.

Subsidiaries of Deak-Perera Hawaii, Inc.

None